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JAMES H. McKENNEY,
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Supreme Court of the United States.

OCTOBER TERM, 1905.

No. [redacted]54

IN THE MATTER

OF

PHILLIP SEMMER GLASS COMPANY, LIMITED,
Bankrupt.

MARTIN CONBOY, Trustee,
Appellant,

against

THE FIRST NATIONAL BANK OF JERSEY CITY,
Claimant-Respondent.

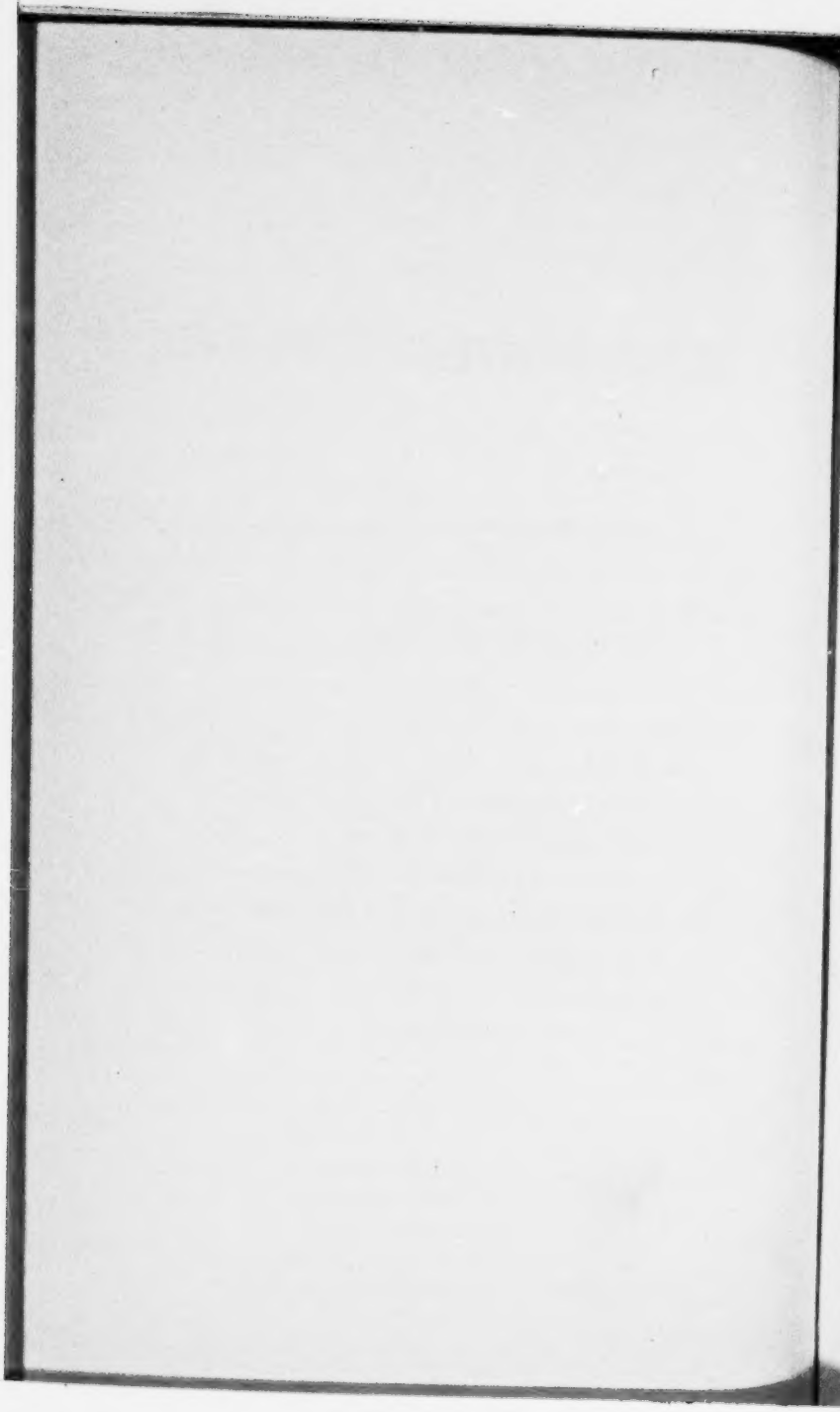
PAPERS ON MOTION TO DISMISS OR AFFIRM.

WILLIAM G. WILSON,
Of Counsel for Respondent.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1905. No. 309.

In the Matter

of

Phillip Semmer Glass Company, Ltd.,
Bankrupt.

Martin Conboy, Trustee,
Appellant,

vs.

First National Bank of Jersey City,
Claimant-Appellee.

And now comes the First National Bank of Jersey City, claimant-appellee herein, and moves this Court to dismiss the appeal of Martin Conboy, Trustee in Bankruptcy of the Phillip Semmer Glass Company, Limited, from the orders and decrees of the Circuit Court of Appeals enumerated in his petition of appeal to this Court, upon the ground that this Court has no jurisdiction to entertain such appeal, for the following reasons: (1) As to the order or decree of January 23, 1905; that the appeal therefrom purports to be taken and is only allow-

able under Section 25*b* of the Bankruptcy Act of July 1, 1898, and under the General Orders in Bankruptcy XXXVI, is required to be taken within thirty days after the judgment or order appealed from, whereas such appeal herein was not taken until more than four months thereafter; (2) As to the order or decree of April 25, 1905; that the appeal therefrom likewise purports to be taken under the same provisions of the Bankrupt Act aforesaid; that said order or decree merely denied a motion of the appellant to recall the mandate theretofore issued upon the original decision of the Circuit Court of Appeals, and afforded no new basis of appeal, and was not in itself appealable; and that if any appeal did lie therefrom it was under the said terms of said General Orders in Bankruptcy required to be taken within thirty days after the judgment or order appealed from, whereas such appeal herein was not taken until more than three months thereafter; (3) As to the order or decree of May 24, 1905; that the same merely denied the petition and motion of the appellant for a rehearing of the original appeal to the Circuit Court of Appeals, four months after the decision of such appeal, and such petition and motion were addressed solely to the discretion of that Court, and the denial of the same is not subject to review by appeal; (4) As to all of said appeals; that their single and sole purpose is to bring before this Court for review the final decision of said Circuit Court of Appeals allowing the claim of this respondent after the time limit for an appeal therefrom had expired. And said claimant-appellee likewise moves this Court to affirm said orders and decrees, so far as the same may be appealable to this Court, on the ground that no question is presented thereby for review which is not already fully settled by the decisions of this and other courts in conformity with the decision of said Circuit Court of Appeals herein.

Dated, New York, September 23, 1905.

WILLIAM G. WILSON,
Of counsel for First National Bank of Jersey City, claimant-appellee.

IN THE

Supreme Court of the United States.

IN THE MATTER

OF

PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

MARTIN CONBOY, Trustee, Appellant,

VERSUS

FIRST NATIONAL BANK OF JERSEY CITY, Respondent.

Please take notice that on the 23d day of October, 1905, a motion will be submitted to the Supreme Court of the United States, at the opening of the Court on that day, upon the record and proceedings in the case, to dismiss the appeal herein of Martin Conboy, Trustee, from the orders and decrees of the Circuit Court of Appeals for the Second Circuit, and to affirm said orders and decrees.

Dated New York, September 23, 1905.

WILLIAM G. WILSON,
Of Counsel for Respondent.

To FRANK A. CLARY, ESQ.,
Of Counsel for Appellant.

Proof of Claim.

IN THE DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

THE PHILIP SEMMER GLASS COMPANY, LIMITED,

Bankrupt.

At Jersey City, in the District of New Jersey, on the day of June, 1903, came George W. Conklin, and made oath and says: That he resides at Hackensack, in the State of New Jersey, and that he is the cashier of the first National Bank of New Jersey, a corporation organized under the laws of the United States and carrying on business as a national banking association at Jersey City, Hudson County, New Jersey, and that he is duly authorized to make this proof. That the above named Philip Semmer Glass Company, Limited, the corporation against which a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to said bank in the sum of nine thousand and eighty 03-100 ($9,080.03) dollars, with interest; that the consideration of the said debt is as follows:

That at the dates specified in the annexed schedule, marked "A," and made part of this proof, the said bank, in the usual course of its business, at the request of said bankrupt, discounted and paid to or placed to the credit of the said bankrupt the proceeds of promissory notes, made by the makers named, and for the amounts specified in the said schedule, all of which were duly endorsed by said bankrupt and delivered so endorsed, before maturity and for value, to the said bank, which is now the lawful owner and holder thereof; that no part of said notes has been paid, except

the sum of nineteen 28–100 ($19.28) dollars, which has been credited on account of the note of G. W. Wacker, leaving a balance due on said note of $250.02, and the total amount of said notes $9,060.94; copies of said notes are hereto annexed; that at the dates of maturity of such of said notes as have matured, said dates being the due dates specified in said schedule, the said matured notes were duly presented for payment, and payment duly demanded, but was refused, and thereupon the said notes were duly protested for non-payment, and due notice thereof was given to said bankrupt, at an expense for protest fees as stated in said schedule, amounting to the sum of nineteen 09–100 ($19.09) dollars, making a total indebtedness of nine thousand eighty 03–100 ($9,080.03) dollars; that there are no counterclaims or offsets to the same; and that the said bank has not, nor has any person by its order, or to the knowledge or belief of this deponent, for its use, had or received any manner of security for said debt whatever, except that judgment has been recovered in the City Court of New York in favor of the said bank against F. C. Lamonte, named in said schedule, upon his note therein specified, and execution has been issued upon said judgment, but has not been returned.

G. W. Conklin,
Cashier of First National Bank of Jersey City.

(Seal)

Subscribed and sworn to before me this 11th day of June, 1903.

Raymond Dawson,
Notary Public of N. J.

(Seal)

Schedule A.

Maker.	Date. 1903.	Time.	Due. 1903.	Amount.	Protest Fees.
H. C. Browning...	Jan. 3	4 mo.	May 3	$601.17	$1.50
G. G. Wacker	Jan. 10	3 "	Apr. 10	269.30	1.30
H. C. Browning...	Jan. 9	4 "	May 9	601.17	1.50
F. C. Lamonte....	Jan. 12	3 "	Apr. 12	200.00	1.25
W. Stabler	Jan. 12	" "	Apr. 12	349.00	1.50
Potts & Partridge.	Jan. 21	4 "	May 21	483.10	1.50
H. C. Browning...	Feb. 5	" "	June 5	384.74	1.50
Z. K. Berlin.....	Jan. 24	" "	May 24	493.65	1.50
K. C. Brown.....	Feb. 6	" "	June 6	597.37	1.50
W. C. Hunter.....	Feb. 9	" "	June 9	425.00	1.50
Z. K. Berlin.....	Feb. 13	" "	June 13	498.93	
G. E. Orcutt.....	Feb. 17	" "	June 17	350.00	
K. C. Brown	Feb. 16	" "	June 16	651.39	
Z. K. Berlin.....	Feb. 20	3 "	May 20	323.60	1.50
W. C. Hunter	Feb. 20	4 "	June 20	425.00	
Peter Wagner.....	Feb. 18	" "	June 18	489.20	
W. Stabler	Feb. 27	3 "	May 27	735.88	1.50
P. Wagner	Mch. 6	4 "	July 6	283.28	
Potts & Partridge.	Mch. 4	" "	July 4	468.34	
Geo. H. Payne....	Mch. 9	" "	June 9	450.00	.54
				$9,080.12	$19.09

G. W. Conklin,
Cashier of First National Bank of Jersey City.

Petition by Trustee for Reconsideration.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF THE PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.	In Bankruptcy.

TO MACGRANE COXE, ESQ., Referee in Bankruptcy:

Your petitioner respectfully shows that he is the Trustee of the above-named bankrupt; that the proof of debt of the First National Bank of Jersey City, claiming to be a creditor of the said Phillip Semmer Glass Company, Limited, was filed herein on the 12th day of June, 1903.

That the said claim should not have been allowed for the following reasons:

1. Because, according to the proof of claim filed by said First National Bank of Jersey City, and verified by its cashier, George W. Conklin, on the 11th day of June, 1903, the said bank claimed upon certain notes drawn by other parties and endorsed by the said bankrupt, which said notes at the time of the filing of the said proof of claim had not yet become due, and the liability of the bankrupt thereon had not at the time of said filing been determined or fixed.

2. Because the said bank, according to the record which it made in the pass-book showing the account of said bankrupt with it, admitted that on the 21st day of March, 1903, there was on deposit with it the sum of $6,232.96, which said sum is not accounted for in said proof of claim, but, your petitioner

is informed and believes that the said bank has attempted to offset against the amount alleged to be due to it on account of discounted paper not matured at the date of the said bankruptcy the amount of the said deposit; and your petitioner objects to such action on the part of the bank for the reason that if permitted it would enable the said bank to obtain a greater percentage of its debt than any other creditor of the same class, said bank having reasonable cause to believe that at the time said offset is claimed to have been effected a preference would be secured, in violation of the provisions of the bankruptcy statute.

3. Your petitioner further says that since the making of the said record admitting the existence of a balance in favor of the said Phillip Semmer Glass Company, Limited, on the 21st day of March, 1903, said bank, so your petitioner is informed and believes, had attempted to offset and counter-claim amounts due upon discounted paper upon which the name of the bankrupt appeared as indorser, and which said paper had not matured at the time of the filing of the petition in bankruptcy against the said Phillip Semmer Glass Company, Limited, and your petitioner objects that the said bank could not legally offset and counterclaim amounts of paper in its possession not yet matured against amounts of deposit then in its possession belonging to the said bankrupt or to the receiver of the said bankrupt upon his appointment.

4. Your petitioner further says that on the various dates within the period of four months prior to the filing of the said petition in bankruptcy, said bank received various amounts upon deposit from said bankrupt, which said amounts the said bank, so your petitioner is informed and believes, subsequently offset and counterclaimed against the amounts of unmatured discounted paper upon which the name of the said bankrupt appeared as indorser, and your petitioner says that the said deposits were in effect a transfer to the said bank of the property of the said bankrupt, the effect of which transfer, if permitted to stand, will be to enable the said bank to obtain a greater percentage of its debt than any other creditor of the same class, the said bankrupt having given the said preference and the said bank receiving it, having had reasonable cause to

believe that it was intended thereby to give a preference in violation of the provisions of the bankrupt statute.

5. And your petitioner further says that the said bank had not the right to offset and counterclaim the amounts due upon unmatured paper upon which the name of said bankrupt appeared as indorser against the amount due upon deposit to the said bankrupt at the time of the filing of the petition in bankruptcy, for the reason that the respective obligations did not constitute mutual debts and mutual credits between the estate of the bankrupt and a creditor; that at the time of the filing of the said petition the account could not be stated and one debt set-off against the other within the meaning of the bankruptcy statute.

6. And your petitioner further says that the said amounts represented by the negotiable paper not matured did not represent a provable debt against the estate of the bankrupt as required by the bankruptcy statute in cases of set-offs and counterclaims.

7. And your petitioner further says that on the 18th day of March, 1903, Peter Alexander, receiver of the above named bankrupt, served a certified copy of the order of his appointment upon the said bank, as deponent is informed, by a reading of the report of said Receiver, and thereby became entitled to the balance of the deposit in favor of the said Phillip Semmer Glass Company, Limited, which the said bank had in its possession and which the said bank admitted three days later, to wit, the 21st day of March, 1903, amounted to the sum of $6,232.96.

8. And your petitioner further says that the said bank had no right to hold said deposit against the maturing of any negotiable paper upon which the name of the said bankrupt appeared, which had not become due at the time of the filing of the copy of the said Receiver's appointment.

9. And your petitioner further says that the said bank having received the said preference and transfers, as heretofore alleged herein, has not surrendered such preferences and

transfers as required by the bankruptcy statute as a condition precedent to the proving of said claim.

10. And your petitioner further says that in divers other respects the said proof of claim is objectionable and it should not be allowed.

That the attorneys of said creditor are Wilson & Wallis, 48 Wall Street, New York.

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore your petitioner prays that the said proof of claim be reconsidered and rejected.

MARTIN CONBOY,
Petitioner.

UNITED STATES OF AMERICA,
Southern District of New York. } ss :—

I, MARTIN CONBOY, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true according to the best of my knowledge, information and belief,

MARTIN CONBOY.

Subscribed and sworn to before me this 12th day of September, 1903.

EDWARD T. MAGOFFIN,
Notary Public,
New York Co.

Order of Referee Allowing Claim.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER
OF
PHILLIP SEMMER GLASS COMPANY,
LIMITED,
Bankrupt.

At the City of New York, in said district, on the 13th day of May, 1904:

The trustees of the above named bankrupt having filed a petition and notice for the re-examination and rejection of the claim of the First National Bank of Jersey City, a creditor, against the estate of the said bankrupt; now, upon the evidence submitted to this Court upon the said claim and upon hearing counsel therein, it is

Ordered, that the amount of the said claim be reduced from $9,080.03, as set forth in the affidavit in proof of the claim filed by said creditor by deducting therefrom the sum of $110.76, the interest on the several notes set forth in the said affidavit between the date of filing the petition and the maturity of the notes, respectively, and by deducting the further sum of $450, the amount of the note of George H. Payne, which, as stipulated by counsel, has been collected by the creditor since the filing of its claim, making a total deduction of $560.76, and that the said claim as so reduced, amounting to $8,519.27, be and it is hereby allowed, and that the last mentioned sum be entered upon the books of the trustee as the true sum upon which dividends shall be computed.

MACGRANE COXE,
Referee in Bankruptcy.

Opinion of Referee.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF PHILLIP SEMMER GLASS CO., LIMITED, Bankrupt.	In Bankruptcy, No. 5757.
CLAIM OF FIRST NATIONAL BANK OF JERSEY CITY.	

WILSON & WALLIS, for the bank.
FRANK A. CLARY, for the trustee.

MACGRANE COXE, Referee:

This is on the application of the trustee in bankruptcy for the re-examination of the claim against the bankrupt estate of the First National Bank of Jersey City.

The petition in bankruptcy, which was involuntary, was filed March 18, 1903. For some time prior to that date, the bankrupt had had a deposit account in the claimant bank, and on said March 18, 1903, there was a balance due to the bankrupt from the bank on this account of $6,232.96. On the same day the bank held unmatured promissory notes made by various makers in favor of the bankrupt, which it had, upon endorsement by the bankrupt, and, in the ordinary course of business, discounted for the bankrupt's account, and on which the bankrupt had received from the bank a sum largely in excess of the balance above mentioned. This balance the bank applied to the payment of these notes as far as it would go, and it has filed its claim, which is the subject of this proceeding for the remainder of the notes, amounting in all, including interest and protest fees, to $9,080.03. The notes

all fell due within one year after the adjudication in bankruptcy. Payment thereon respectively was duly demanded and refused, and notice of protest given to the bankrupt as endorser.

The objections of the trustee are based upon the fact that the notes were unmatured on the day the petition in bankruptcy was filed. He urges that, for this reason, it was not within the right of the bank to offset the deposit in its hands against the indebtedness of the bankrupt on the endorsements, and that should it be permitted to do so, the result would be an unlawful transfer and a preference of the bank to the extent of the deposit over the bankrupt's other creditors of the same class.

It seems now well settled, and, indeed, the trustee does not deny that, had the notes fallen due before instead of after the filing of the petition, the offset would have been proper. There are a number of decisions to this effect, both under the present and the former Bankruptcy Acts (Hough v. First National Bank, 4 Biss., 349; Blair v. Allen, 3 Dill., 101; *In re* Farnsworth, 5 Biss., 224; *In re* Little, 6 Am. B. R., 681, 692; 110 F. R., 621; *In re* Elslasser, 7 Am. B. R., 215.) And so, finally, is the decision of the Supreme Court of the United States in the recent case of New York County National Bank v. Massy (11 Am. B. R., 42; 192 U. S., 138). The ground of the decision in this last case is that the bankrupt's deposit in the bank, under the circumstances, did not constitute a transfer as defined by the Bankruptcy Act, for the reason that the estate of the bankrupt was not diminished thereby, the bankrupt being at liberty freely to check against the deposit in the bank up to the time of the institution of the bankruptcy proceedings. The Court thereupon held that there was such mutuality between the two debts as permitted one to be set-off against the other under Section 68 of the act.

This decision disposes of the objection of the trustee that the deposit here was a preferential transfer, and we have remaining only the question as to whether the fact that the notes here were unmatured at the time of the filing of the petition in bankruptcy eliminates that quality of mutuality which is required by Section 68, in order to permit of set-off.

The trustee's contention is that on the day of

the filing of the petition there was no such mutuality; that there was, on that day, a debt due by the bank to the bankrupt, but no debt due by the bankrupt to the bank. He further contends that immediately upon the filing of the petition in bankruptcy other and paramount equities in favor of the general creditors of the bankrupt intervened, and became superior to the equities existing between the bankrupt and the bank; and that immediately thereupon the fund in the bank became impressed with a trust in favor of the general creditors of the bankrupt and could not be retained by the bank alone.

The trustee in support of this contention cites authorities of the New York and Pennsylvania courts, and there is no doubt that under the statutes of those States, the law is as he declares it to be. But the Bankruptcy Act creates a different rule of set-off, or rather, perhaps, better, adds to the classes of cases to which the rule is to be applied.

At common law, and under the statutes of New York and of other States, it is well settled that there can be no set-off unless the mutual debts are both due and payable in the hands of the parties for and against whom set-off is sought, that is to say, that unless they are precently payable as well as due the requisite mutuality does not exist (Munger v. Albany City Bank, 85 N. Y., 580–586). Under the Bankruptcy Statute, however, by Section 63*a*, a debt is declared provable against the bankrupt estate, that is, I take it, for the purposes of bankruptcy, payable out of the estate, although not by its terms payable until after the filing of the petition, if only it be absolutely owing at that time. The operation of this section seems to be to hasten in such cases, and for the purposes of bankruptcy administration, the maturity of the debt.

In the case of Meyer v. Dickinson, 5 Am. B. R., 593; 107 F. R., 86, Judge THOMAS maintained the right of set-off in such a case as the one under consideration against unmatured paper of the bankrupt firm, holding that upon the institution of bankruptcy proceedings another and different rule of set-off applied from that existing under the statutes of Pennsylvania.

It seems to be the provability of the debt which is the criterion of its availability for the purposes of set-off. It was so said *In re* Kalter, 2 N. B. N., 264, in which case such an offset as is sought here was upheld. The fact

that Section 68*b* prohibits a set-off of any debt which is not provable would point inferentially to the same conclusion.

There seems now to be no question, though it was at first much doubted, that the claim of the bank in this case is a provable claim, notwithstanding the immaturity of the paper at the date of the commencement of the bankruptcy proceedings. It was so held *In re* Gersen, 6 Am. B. R., 11; 107 F. R., 897. The Circuit Court of Appeals for the Third Circuit in that case, affirming the District Court, holds that the liability of a bankrupt endorser of commercial paper can be proved against his estate in bankruptcy, although the paper did not fall due until after the filing of the petition.

Nor should we overlook the use of the term "mutual credits" in addition to the term "mutual debts" in Sec. 68. While these terms are to be used as correlatives (Libby v. Hopkins, 104 U. S., 303), they are not to be construed as meaning one and the same thing (Lord KENYON in Atkinson v. Elliott, 7 T. R., 378). The term mutual credits first appears in the English Bankruptcy System in the year 1705 (4 & 5 Anne, C. 17, Sec. 11), and it has been found in all of our bankruptcy acts from the beginning (Act of 1800, Sec. 42; Act of 1841, Sec. 5; Act of 1867, Sec. 20; U. S. R. S., Sec. 5073). It has from the first been considered of importance, and as adding materially to the cases which were held comprised under the terms mutual debts. Thus, Robson on Bankruptcy, 7th Edition, p. 365, says:

"The right of set off given by the Bankruptcy laws, not being confined, as in the statutes of set-off, to mutual debts, but being extended to mutual credits * * * it necessarily applies to a much larger number of demands than is comprised in the term mutual debts. * * * One of the earliest questions which arose on the mutual credit clause was whether a debt payable *in futuro* could be set-off against a debt payable *in præsenti*. And this was decided in the affirmative on the ground that, though there might not be mutual debts actually payable between the parties, still there were mutual credits, and that the case came within the equities of the statute."

Under Sec. 20 of the Act of 1867, the language of which is substantially the same to that of Sec. 68 of the present act, such an offset as is here sought by the bank against an unmatured obligation was upheld (*Ex parte* Howard National Bank, 2 Lowell, 487; *In re* Petrie, 5 Ben., 110).

On the whole, I conclude that the mutuality required by the Bankruptcy Act existed, and that the offset was proper.

Objection is further made by the trustee, as to several of the notes, that they had not become due even at the time of the proof of claim was made, June 11, 1903. This is true, but they had all become due before the proof was closed in this proceeding, and it appears from the record that these notes, like the others, had been duly protested for non-payment, with notice to the bankrupt. These notes, therefore, are substantially in the same situation as the others, and it follows that the same rules should apply to them.

All of the notes we have seen fell due within one year from the date of the adjudication It is not, therefore, necessary to decide, and is not decided what would be the result were this not the case, as affected by Section 57*n* of the Bankruptcy Act.

There should, however, be a deduction from the claim as filed. Under Section 63*a* there should be a deduction of interest on the several notes between the date of the filing of the petition and the maturity of the notes, respectively. This amounts to $110.76. and should be deducted from the amount of $9,080.03, set forth in the claimant's proof of claim. With this deduction the claim should be allowed.

An order may be submitted accordingly on notice or consent.

New York, May 7, 1904.

MACGRANE COXE,
Referee in Bankruptcy.

Order of District Court affirming referee.

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Post Office Building, in the City of New York, on the 7th day of June, 1904.

Present: HON. GEORGE C. HOLT, District Judge.

IN THE MATTER OF THE PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.	In Bankruptcy No. 5757.

On reading and filing the petition of Martin Conboy, trustee of the above named bankrupt, verified the 17th day of May, 1904, and notice of motion thereon to review the order made by the Referee herein on the 13th day of May, 1904, allowing the claim of the First National Bank of Jersey City, as reduced by said order; and on the said order and all proceedings therein referred to; and on hearing counsel for the said trustee and said creditor, it is

Ordered, that the said order be and is hereby affirmed.

GEORGE C. HOLT,

J.

Appeal of Trustee to Circuit Court of Appeals.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF PHILLIP SEMMER GLASS COMPANY, LTD, Bankrupt.	In Bankruptcy, No. 5757.

Petition on appeal of Martin Conboy, Trustee in Bankruptcy of the Phillip Semmer Glass Company, Limited, Bankrupt.

The above named Martin Conboy, Trustee in Bankruptcy, considering himself aggrieved by the judgment made and entered on the 7th day of June, 1904, in the above entitled action, confirming the order of the Referee allowing the claim herein of the First National Bank of Jersey City in the sum of $8,519.27, does hereby appeal from such judgment to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which the said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

FRANK A. CLARY,
Attorney for Martin Conboy,
Trustee in Bankruptcy.

The foregoing claim of appeal is allowed.

GEO. C. HOLT,
District Judge.

[ENDORSED:] Petition on Appeal.—Filed June 11, 1904.

Assignment of Errors on Appeal to Circuit Court of Appeals.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.	In Bankruptcy, No. 5757.

And now on the 9th day of June, 1904, comes the said Martin Conboy, as Trustee in Bankruptcy of the Phillip Semmer Glass Company, Limited, bankrupt, by Frank A. Clary, Esq., his solicitor, and says:

That the judgment entered in said cause on the 7th day of June, 1904, confirming the order of the Referee, allowing the claim of the First National Bank of Jersey City, is erroneous and against the just rights of the said Trustee in Bankruptcy for the following reasons:

FIRST:—Because the evidence shows that at the time of the filing of the petition in bankruptcy said bankrupt had on deposit in said bank the sum of $6,232.96. That at said time of the filing of the petition in bankruptcy the bank held certain promissory notes in an amount greater than such deposit which notes were made to the order of the bankrupt and had been theretofore endorsed by the bankrupt to the bank, and upon which notes the bankrupt was then liable to the bank as endorser.

That the Receiver of the bankrupt demanded such deposit from the bank immediately after the filing of said petition in bankruptcy but the bank refused to surrender or pay the same and forthwith, and before the maturity of any of said notes, applied the said deposit upon and against the bankrupt's said liability to the bank as endorser on certain of said notes.

The Court erred in holding and adjudging that the said bank had the right to make such set-off under Section 68*a* of the Bankruptcy Act.

SECOND :—Because the evidence shows the facts recited in the first assignment of error herein and the Court erred in holding and adjudging that the application of the amount of such deposit as aforesaid to the payment of the bankrupt's liability as endorser of certain of the promissory notes, so as aforesaid in possession of said bank, and not matured at the date of the filing of the petition in bankruptcy, was not an undue and unlawful preference within the meaning of the Bankruptcy Act and in allowing the bank to prove any claim against the estate of said bankrupt before the re-payment to the said estate of the amount so applied on the said promissory notes.

Wherefore, the said Martin Conboy, Trustee in Bankruptcy of said Phillip Semmer Glass Company, Limited, bankrupt, prays that said judgment affirming the action and ruling of the Referee allowing the claim of said the First National Bank of Jersey City in the sum of $8,519.27, be reversed and that the said Court may be directed to enter a judgment and order reversing the action, ruling and order of the Referee.

FRANK A. CLARY,
Solicitor for Martin Conboy, Trustee in Bankruptcy of the Phillip Semmer Glass Company.

Order of Circuit Court of Appeals Affirming Decree of District Court.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 23rd day of January, one thousand nine hundred and five;

Present:

HON. E. HENRY LACOMBE,
HON. WILLIAM K. TOWNSEND,
HON. ALFRED C. COXE,
Circuit Judges.

IN THE MATTER OF THE PHILIP SEMMER GLASS COMPANY, LTD., Bankrupt, MARTIN CONBOY, as Trustee, etc., Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

W. K. T.
E. H. L.
A. C. C.

ENDORSED: United States Circuit Court of Appeals, Second Circuit. Filed Jan. 23, 1905. William Parkin, Clerk.

Opinion of Circuit Court of Appeals.

UNITED STATES CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

Before LACOMBE, TOWNSEND and COXE, Circuit Judges.

IN THE MATTER

OF

PHILIP SEMMER GLASS CO.,
Bankrupt.

MARTIN CONBOY, Trustee,
Appellant.

This cause comes here on appeal from an order of the District Court, Southern District of New York confirming a report of Referee in Bankruptcy which allowed the claim of the First National Bank of Jersey City for $8,519.27 against the bankrupts' estate.

Per Curiam.

It seems unnecessary to add anything to the discussion of the case which will be found in the report of the Referee, 11 Am. Bank Rep., 665. It was held in N. Y. County National Bank v. Massey 192 U. S. 138 that, in the absence of fraud or collusion a bank which holds promissory notes of a bankrupt need not surrender a deposit balance standing to the credit of the bankrupt on the day of the adjudication in bankruptcy, but may set it off against said notes and prove for the amount remaining due after such set-off. The appellant seeks to differentiate the case at bar on the ground that the notes held by the First National Bank were not due, at the date of adjudication (they have since matured) and that the bankrupt was not the maker but the endorser—wherefore the notes did not constitute a "debt" of the bank-

rupt. His argument is interesting and ingenious but entirely disregards Section 1 subdivision 11 of the Bankruptcy Act, which provides that the word "debt" when used in said act "shall include any debt, demand, or claim provable in bankruptcy". That meaning must be given to the word when used in the set-off section (68): "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid". To determine therefore whether the holder of a claim is entitled to the benefit of section 68 it is necessary only to enquire whether his claim is one provable in bankruptcy.

We concur with the Court of Appeals for the Third Circuit (Moch v. Market St. Nat. Bank, 107 F. R. 897) in the conclusion that the liability of a bankrupt endorser of commercial paper which did not become absolute till after the filing of the petition is a debt provable in bankruptcy.

The order appealed from is affirmed with costs.

Order Circuit Court of Appeals Denying Motion to Recall Mandate.

At a Term of the Circuit Court of Appeals of the United States held in and for the Second Circuit at the Post-Office Building, in the City of New York, Southern District of New York on the 26th day of April, 1905.

Present:

HON. WILLIAM J. WALLACE,
" E. HENRY LACOMBE,
" WILLIAM K. TOWNSEND,
} Circuit Judges.

IN THE MATTER

OF

PHILLIP SEMMER GLASS COMPANY, LIMITED,
Bankrupt.

MARTIN CONBOY, Trustee,
Appellant,

vs.

FIRST NATIONAL BANK OF JERSEY CITY,
Claimant-Appellee.

This cause coming on to be heard on the petition of Martin Conboy, Trustee, for cancellation of the judgment entered herein, and the same having been duly considered,

Now, upon reading and filing the petition for a rehearing verified the 15th day of April, 1905, and the notice of motion thereon, dated the 13th day of April, 1905, and after hearing Martin Conboy, Esq., of counsel for the petitioner and William G. Wilson, Esq., in opposition thereto, and the Court being fully advised thereon, it is

ORDERED that the said petition to recall the mandate of this Court and to vacate the order for the same be and the same hereby is denied.

Order Circuit Court of Appeals Denying Petition for Rehearing.

At a Stated Term of the Circuit Court of Appeals of the United States held in and for the Second Circuit at the Post-Office Building in the City of New York, Southern District of New York on the 24th day of May, 1905.

Present:

HON. E. HENRY LACOMBE,
HON. WILLIAM K. TOWNSEND,
HON. ALFRED C. COXE,
} Circuit Judges.

IN THE MATTER

OF

PHILLIP SEMMER GLASS COMPANY, LIMITED,

Bankrupt,

MARTIN CONBOY, Trustee,

Appellant,

AGAINST

FIRST NATIONAL BANK OF JERSEY CITY,

Claimant-Appellee.

The Court having rendered its decision on this appeal at said term, January 12th, 1905, and judgment thereon having been entered by the Clerk at said term, January 23rd, 1905, and the said Martin Conboy, Trustee, appellant, having presented a petition for a re-hearing at said term, and the said petition having been filed by the Clerk on the 8th day of May, 1905, and the Court having duly considered the said petition and having rendered its decision denying the said petition for a re-hearing at said term on the 17th day of May, 1905, it is

ORDERED that the said petition for a re-hearing on this appeal be and the same is hereby denied.

Petition of appeal to Supreme Court.

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES

FOR THE SECOND CIRCUIT.

IN THE MATTER OF PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.	Petition for Appeal.

MARTIN CONBOY, Trustee, Appellant, AGAINST FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.	

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The appeal of Martin Conboy, the Trustee of the Phillip Semmer Glass Company, Limited, Bankrupt, respectfully shows:

That upon the 18th day of March, 1903, a petition in bankruptcy was filed against the Phillip Semmer Glass Company, Limited, and pursuant to said petition an order of adjudication was duly entered therein on the 4th day of April, 1903, the proceeding being in the United States District Court for the Southern District of New York.

For some time prior to the date of the filing of the petition, the bankrupt had an account with the First National

Bank of Jersey City, the claimant above named. On that date there was a balance due to the bankrupt from the claimant on this account of $6,232.96. On the same day, the bank held unmatured promissory notes made by various makers in favor of the bankrupt and, in the ordinary course of business, discounted for the bankrupt's account. The amount of these notes, so discounted, was $15,293.90. On the 12th day of June, 1903, a proof of debt was filed by the said claimant in the bankruptcy proceeding, in which the claimant alleged that the bankrupt was, at and before the filing of the petition in bankruptcy, indebted to the bank in the sum of $9,080.03, this amount being the aggregate of various notes of other parties endorsed by the bankrupt and discounted by the bank. The account between the bankrupt and the bank was the ordinary and usual deposit account between banker and depositor.

The trustee objected to the proof of claim and petitioned that it be disallowed for the reason that the bank had utilized the amount on deposit with it on the filing of the petition in bankruptcy in payment of other notes than those proved on, similarly made, endorsed and discounted which had not matured at the time of the filing of the petition.

After testimony was taken, establishing the above facts, the referee held that the claimant was permitted by the provisions of § 68 of the Bankrupt Act to set off against the unmatured obligations of the bankrupt, the amount on deposit to the credit of the bankrupt and denied the trustee's petition. The said referee held that the said notes and the said deposit account constituted mutual debts and mutual credits between the said First National Bank of Jersey City and the said bankrupt, and that the same should be set off one against the other, and that the said First National Bank of Jersey City had properly filed its proof of claim for the balance only, and that the same was properly allowed and dividends should be paid thereon.

Thereafter the said trustee, feeling aggrieved by the action of the referee, sought a review of the decision of said referee by petition for that purpose and the matter coming on to be heard before the District Court of the United States in the Southern District of New York, the ruling of said referee was affirmed; and the trustee, still feeling himself aggrieved, ap-

pealed from the said order of the District Court to the Circuit Court of Appeals for the Second Circuit, and, the said appeal duly coming on to be heard, the said Circuit Court of Appeals affirmed the said order of the District Court, holding that the said notes and the said deposit account constituted mutual debts and mutual credits between the said First National Bank of Jersey City and the bankrupt and, on the 23rd day of January, 1905, an order was duly entered and filed by the said Circuit Court of Appeals affirming the order of the District Court and the ruling of the said referee as aforesaid.

That in view of the fact that no findings of fact and conclusions of law were filed by the said Circuit Court of Appeals prior to or at the time of the rendition of said judgment, the trustee, on or about the 25th day of April, 1905, petitioned the said Circuit Court of Appeals for the Second Circuit to recall its mandate and vacate the order for the same on the ground that the judgment rendered was irregular; that said petition came on to be heard on the said 25th day of April, 1905, and, after due consideration thereof, said motion was denied.

Thereafter and on the 8th day of May, 1905, said trustee presented a petition for re-hearing in due form to the said Circuit Court of Appeals for the Second Circuit, relying upon the decision of the Supreme Court of the United States in the case of Western Tie & Timber Co. v. Brown, 196 U. S. 502. That said petition was duly considered by the said Circuit Court of Appeals for the Second Circuit and, on the 24th day of May, 1905, an order, on their decision so rendered on the 17th day of May, 1905, was entered denying the same.

That, as the appellant, Martin Conboy, Trustee, is informed and believes, in the proceedings above recited, errors have been committed by the learned Circuit Court of Appeals in holding that the First National Bank of Jersey City had properly filed its proof of claim, and that the same was properly allowed and dividends should be paid thereon, by reason of all of which your petitioner has sustained grievous loss.

Wherefore this appellant appeals from the whole of the said order of affirmance of the Circuit Court of Appeals for the Second Circuit, dated the 23rd day of January, 1905, and from the whole of the said order of the Circuit Court of Appeals for the Second Circuit, dated the 25th day of April, 1905, denying

the motion of your petitioner to recall the mandate of said court and cancel the order for same, and from the whole of the said order of the Circuit Court of Appeals for the Second Circuit, dated the 24th day of May, 1905, denying the petition of the said trustee for a re-hearing; and respectfully prays that the said orders and decrees and the pleadings may be sent to the Supreme Court of the United States without delay and that the said Supreme Court will proceed to hear the said cause, and that the said orders and decrees of the Circuit Court of Appeals for the Second Circuit and every part thereof may be reversed and a decree made directing that the claim of the said First National Bank of Jersey City, as filed, be disallowed, and that your petitioner may such other and further relief in the premises as may be just.

Dated, May 24th, 1905.

FRANK A. CLARY,
Solicitor and Counsel for Appellant, Martin Conboy, Trustee,
27 Pine Street,
New York.

Allowed May 27, 1905.
R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.

Certificate of Mr. Justice Peckham.

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES

FOR THE SECOND CIRCUIT.

IN THE MATTER OF PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.	Certificate of Justice of the Supreme Court of the United States.
MARTIN CONBOY, TRUSTEE, Appellant, AGAINST FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.	

In this cause, I hereby certify that, in my opinion, the determination of the question or questions involved in the allowance or rejection of the claim of the First National Bank of Jersey City is essential to a uniform construction of the Bankrupt Law throughout the United States.

This certificate is made conformably to Act of Congress of July 1, 1898, § 25–*b*, paragraph 2.

Dated this 27 day of May, A. D. 1905.

R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.,
Washington,
D. C.

Assignment of Errors.

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES

FOR THE SECOND CIRCUIT.

IN THE MATTER OF PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.	
MARTIN CONBOY, Trustee, Appellant, AGAINST FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.	Assignment of Errors.

And now, on the 27th day of May, 1905, comes the said Martin Conboy, as Trustee in Bankruptcy of the Phillip Semmer Glass Company, Limited, Bankrupt, by Frank A. Clary, Esq., his solicitor and counsel, and says:—

That the judgment rendered in said cause on the 23rd day of January, 1905, affirming the order of the United States District Court, allowing the claim of the First National Bank of Jersey City, and the order entered in said cause on the 25th day of April, 1905, denying the motion of the said trustee to have the said Circuit Court of Appeals for the Second Circuit recall its mandate and vacate the order thereon, and the order entered on the 24th day of May, 1905, denying the petition for re-hearing, are erroneous and against the just rights of the trustee in bankruptcy for the following reasons:—

First. For that the said Circuit Court of Appeals finds that the unmatured notes held by the First National Bank of Jersey City against the bankrupt and the claim of the bankrupt against the said First National Bank of Jersey City on its deposit account were mutual debts and mutual credits and that the same should be set off one against the other; and for the further reason that the said Court finds that the allowance of said set off was not an unlawful preference within the true intent and meaning of the Bankrupt Law.

And the said appellant prays that the orders aforesaid may be reversed, annulled and altogether held for naught and that he may be restored to all things which he has lost by reason of said orders.

Frank A. Clary,
Solicitor and Counsel for Appellant, Martin Conboy, Trustee,
27 Pine Street,
New York.